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Supreme Court, U.S.
FILED
JUN 26 2001
CLERK

No. 00-1629

IN THE

Supreme Court of the United States

JUNO MARINE AGENCY, INC., a Florida corporation, NAVIERA TURRIALBA/INVERSIONES JUNO, S.A., and GARDA MARINE, INC.,

Petitioners,

v.

TRACY TAIBL, Special Personal Representative of the Estate of STACEY NORMAN TAIBL, for the Use and Benefit of TRACY TAIBL, minor daughter, and the Estate of Stacey Norman Taibl, deceased,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEAL, STATE OF FLORIDA

REPLY BRIEF

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REPLY ARGUMENT

The Petitioners have elected to file a Reply In Support of their Petition for Writ of Certiorari primarily to address the issue of judicial estoppel raised by the Respondents. This issue has particular significance in light of this court's decision, rendered on May 29, 2001, in *New Hampshire v. Maine*, 121 S. Ct. 1808 (2001) which recognizes that judicial estoppel prevents a party from *prevailing* in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. As this court recognized, "the purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." 121 S. Ct. at 1814. Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations, and thus poses little threat to judicial integrity." *Id.*

The Petitioners quite agree that the doctrine of judicial estoppel is applicable here. However, that doctrine may only be utilized to estop a party who has *successfully* argued a position from arguing the contrary. Accordingly, it is the Respondent, not the Petitioners, who is estopped from changing *her* position with respect to whether Mr. Taibl was a Jones Act seaman at the time of his death. In her response, at page 6, Taibl makes the following indecorous and unsupported accusation:

> In an attempt to gain certiorari review in this case, Petitioners have mischaracterized Mr. Taibl's status. Laid bare, the Petition argues that which the petitioners *admitted was false* in their briefs before the United States Court of Appeals last

> decade: that at the time of the heroic attempted rescue Mr. Taibl was a Jones Act seaman and that he was acting as a longshoreman covered by Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 901, *et seq* ("LHWCA"). Based upon their positions in the Federal Court proceedings, petitioners are estopped from arguing the foregoing, but nonetheless make these mischaracterizations in an attempt to fit the case within the scope of *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), which held that nonpecuniary general maritime law damages are unavailable to Jones Act seamen.

(Response p. 6).

Petitioners admitted that no such thing was false. Petitioners did argue – in vain – that the Federal District Courts' determination that Taibl was a Jones Act seaman at the time of his death was legally incorrect. To this day, Petitioners believe that the Federal District Court, and hence the Eleventh Circuit Court of Appeal, erred by, respectively holding and then affirming, that Mr. Taibl was a Jones Act seaman at the time of his death. Nevertheless, as the Respondent is quick to observe, Petitioners *lost* that argument at every step along the way.

Accordingly, Petitioners are not estopped to argue that Taibl was a Jones Act seaman at the time of his death, and that his daughter's remedies are, therefore, governed by *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). To the contrary, the doctrine of judicial estoppel, should preclude *Respondent* from claiming that her father was *not* a Jones Act seaman at the time of his death. The only party involved

in these proceedings who has successfully argued a position and then reversed that position is the Respondent Taibl, not the Petitioners.

In August of 1990, three months *before* this court issued Miles, Taibl filed a Motion for Summary Judgment challenging Petitioners's right to exoneration from or limitation of liability. Taibl argued that her father

> was a stevedore attempting to rescue trapped and injured crew members at the time of the injury which produced his death. As such, it is well settled under the admiralty principles of both salvage and the Good Samaritan doctrine that Mr. Taibl was to be accorded the status of a seaman and that his survivors may therefore recover under the doctrine of unseaworthiness.

(SR 70-71).

The Respondent acknowledges that the U.S. District Court initially agreed that Mr. Taibl's status as a longshoreman under the LHWCA precluded his claim for unseaworthiness pursuant to 33 U.S.C. § 905(b). (Response pp.19-20). Next, however, Taibl asserts that she "moved for relief because the record proved Mr. Taibl was not acting as a longshoreman at the time of his death." (Response p.20). Respectfully, that description is not accurate.

Taibl moved for relief from the District Court's initial ruling, not because the record proved that he "was not acting as a longshoreman at the time of his death," but because his daughter understood that liability for negligence was an uncertainty and that she could not access the warranty of

seaworthiness and its strict liability standard unless she convinced the court that her father was a seaman "who was doing the ship's work," *McDermott International v. Wilander*, 498 U.S. 337 (1991) at the time of his death. Taibl was concerned about the effect that testimony that her father had been warned not to enter the deep tank would have on the issue of negligence. Taibl was specifically warned not to enter the tank by Port Security Officer Vilander Wynters (Tr. 1179) and Metro-Dade Firefighter Dave Clark (Tr. 1702).

Indeed, the Federal R. Civ. P. 60(b) motion filed on the eve of the Federal bench trial asserted that Mr. Taibl could be deemed to be *both* a longshoreman and a seaman pursuant to this court's then-recently decided opinion in *Southwest Marine Inc. v. Gizoni*, 502 U.S. 81 (1991). In her motion Taibl described *Gizoni* as a case where "a unanimous Supreme Court held that a maritime worker, whose occupation is one of those enumerated in the [LHWCA], may nevertheless still be a seaman within the meaning of the Jones Act and therefore entitled to bring suit for the full panoply of seaman's remedies." (SR 131).

Taibl also asserts, in true 20/20 hindsight, that "Taibl's recovery under the warranty of seaworthiness was and is irrelevant to the petitioner's liability". (Response p.12). This is "Monday morning quarterbacking" at its best. If access to the warranty of seaworthiness was irrelevant to the petitioner's liability *before* the Federal bench trial, then one must ask why Taibl worked so long and so furiously to gain access to that warranty? The truth of the matter is that Taibl desperately needed access to the warranty of seaworthiness because she could not be certain if she could meet the higher threshold of establishing negligence, and

because of concerns about comparative negligence in light of testimony that her father was warned not to enter the deep tank.

There is no such thing as a *Grigsby* Seaman

Respondent continues to cling to the notion that, as a "*Grigsby*" seaman, her father was a member of a narrow class of non-seafarers entitled to the warranty of seaworthiness on the issue of liability, yet not restricted by the limitations on recovery established by *Miles*.

However, Taibl glosses over the fact that the extension of the warranty of seaworthiness to the maritime salvor in *Grigsby* was premised entirely upon this court's decision in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), which, even the respondent acknowledges, was overruled by Congress in 1972. (Response p.10). In short, there is no such thing as a *Sieracki* or *Grigsby* seaman in light of the 1972 amendments to the LHWCA.

There is only *one* type of seaman: a Jones Act seaman. Accordingly, since Taibl successfully argued for and obtained that status for her father in the Federal court proceedings, she should have been estopped to argue to the contrary when she sought to recover damages in the state court proceedings. Taibl's embrace of seaman status for her father when it benefitted her on liability, and rejection of that status when it did not benefit her claim for damages, constitutes the taking of inconsistent positions and makes a "mockery of justice." *American National Bank of Jacksonville v. Federal Deposit Insurance Co.*, 710 F.2d 1528 (11th Cir. 1983).

Taibl hopes to convince this court that the Petitioner's position would have the draconian effect of denying Taibl "*any recovery of any kind*" (Response p.11). However, Taibl overlooks the fact that, even pursuant to *Miles*, she was entitled to recover for Mr. Taibl's pre-death pain and suffering, which the jury assessed at $1,000,000, and that her step-mother, Mr. Taibl's widow, settled her claim for an amount in excess of $1 million. Accordingly, the assertion that Mr. Taibl's survivors would be denied "any recovery of any kind" under the Petitioner's argument is specious.

Equally as specious is Taibl's mischaracterization of our position to suggest that we would deny Mr. Taibl non-seafarer status if, like Natalie Calhoun, he died riding a jet ski while on vacation, simply because he was a longshoreman by trade. (Response p.23). Mr. Taibl was on the job when the emergency arose on the Turrialba, which was laying alongside Taibl's place of employment at the Port of Miami. Accordingly, there was more than just a coincidental relationship between his status as a longshoreman and his death. Moreover, his survivors pursued an LHWCA action until they realized the limits which such an action would place on their recovery.

If Taibl is truly concerned about the merits of comparative recoveries, she should consider that her recoveries have far outstripped those recoveries allowed to the survivors of crewman Fajardo, who her father was trying to rescue. Having reaped the benefit of the strict liability standard under the warranty of seaworthiness, which is accorded only to seamen, the respondent should not have been allowed to obtain the recoveries of a non-seafarer under *Yamaha*.

Rather, the *Miles* uniformity principle shall apply here:

> It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault [referring to claims for unseaworthiness] than Congress has allowed in cases of death resulting from negligence [referring to the Jones Act and DOHSA] . . . Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or *general maritime law*.

Miles, 498 U.S. at 27.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari and accept jurisdiction of this case where the estate of the decedent, a longshoreman by trade, and a Jones Act seaman by request, was nevertheless allowed to recover non-pecuniary state law remedies that are inimicable to general maritime law. In addition, this Court should seize the opportunity to clarify whether or in what circumstances punitive damages may be recoverable under federal maritime law.

Respectfully submitted,

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